(1)

NO. 88-1476

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,
Petitioners

VERSUS

ARKOMA ASSOCIATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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31pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. T. Carden, et al.*, ____ F. 2d ____ (5th Cir. 1988), rehearing denied, January 5, 1989; is in conflict with this Court's decision in *Navarro Savings Association v. Lee, et al.*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980).

2. Whether the citizenship of the limited partners of a purported Arizona limited partnership named plaintiff in a civil case is relevant to a determination of diversity jurisdiction.

3. Whether diversity jurisdiction exists in a civil case in which the citizenship of a limited partner of plaintiff limited partnership is the same as that of the defendants.

STATEMENT OF PARTIES

Pursuant to Rule 21.1 (b) and Rule 28.1 counsel for petitioners certify that the following named persons are parties to this proceeding:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Robert Eltonhead;
(20) Dennis Swan;
(21) Dick Gibson;
(22) Dr. John Hagan;
(23) Leo Hallack;
(24) Robert E. Harmon;
(25) Richard L. Harmon;
(26) Earl Hoatson;
(27) Andrew Kaufman;
(28) Dr. Allen Parelman;
(29) Bill Kryger;
(30) L V A Partnership
(31) Dr. Richard Lynch;
(32) Mc Fadin Partnership;
(33) John Mc Keever;
(34) Percy Mc Kinley;
(35) Nat N. Nast;
(36) Dr. John Pawsat;
(37) Henry Rankin;
(38) David Russell;
(39) Robert Samson;
(40) Dr. Daniel Scharf;
(41) Robert Schneider;
(42) Larry Shultz;
(43) Keith Shultz;
(44) Elton Shannon;
(45) Ernest Staub;
(46) Frances Swan;
(47) John Sullivan;
(48) Jon Symon;
(49) David Wharton;
(50) Dale Williams;
(51) Dr. Robert Doering; and
(52) Jim Veselich.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,
Petitioners

v.

ARKOMA ASSOCIATES, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Petitioners, C. T. Carden, Leonard L. Limes, and Magee Drilling Company, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in *Arkoma Associates v. C. T. Carden, et al.* nos. 87-3624; 87-3917, not reported (5th Cir. 1988).

The decision is set forth in the Appendices.

GROUNDS FOR JURISDICTION

The opinion of the Fifth Circuit Court of Appeals in this case was rendered on December 7, 1988, and rehearing was denied January 5, 1989. This petition for a writ of certiorari was filed within ninety days of the denial rehearing.

Jurisdiction of the Court is predicated on Title 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States:

United States Constitution, Article III Section 2, states:

" The judicial Power shall extend to all Cases, in Law and Equity, . . . between citizens of different States. . ."

28 U.S.C. 1332 (a), states:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of costs, and is between —

(1) citizens of different States; . . . "

STATEMENT OF THE CASE

Respondent, Arkoma Associates, a purported Arizona limited partnership, filed this action against Petitioners, C. T. Carden and Leonard L. Limes, as the quarantors of an equipment lease entered into among the various individuals comprising and in the name of Respondent, Arkoma Associates, as lessor, and Petitioner, Magee Drilling

Company, as lessee. Petitioners, C. T. Carden and Leonard L. Limes, are citizens of Louisiana; petitioner Magee Drilling Company is a citizen of Texas. One of Respondent's purported limited partners is a citizen of Louisiana. Because of the identity of citizenship among Petitioners and Respondent's Louisiana purported limited partner, Petitioners moved to dismiss this action for lack of diversity jurisdiction. The Trial Court denied the motion to dismiss but certified the question of diversity jurisdiction to the Fifth Circuit Court of Appeals pursuant to 28 U. S. C. 1292 (b). Petitioners filed a petition for interlocutory appeal which was denied by the Fifth Circuit Court of Appeals on the basis of its decision in the case of *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986). Petitioners filed an application for certiorari in this Court seeking review of the Fifth Circuit's denial of their petition for interlocutory appeal. This Court refused the application for certiorari.

This action was then tried on the merits resulting in a judgment in favor of Respondent. The District Court was affirmed on appeal, rehearing was denied, and this application for certiorari was filed in this Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action conflicts with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

2. There is a conflict in the decisions of the Fifth Circuit Court of Appeals on the one hand, and those of the Third, Fourth, and Seventh Circuit Courts of Appeals on the other, relative to the determination of diversity jurisdiction in cases in which a limited partnership is a party. *Lee v. Navarro Savings Association*, 597 F. 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986); and

the instant decision hold that diversity jurisdiction exists in cases in which a limited partnership is a party and is composed of limited partners some of whom posses citizenship which is the same as that of an adverse party.

Carlsberg resources Corporation v. Cambria Savings & Loan Association, 554 F. 2d. 1254 (3rd Cir. 1977); *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); and *Elston Investment Ltd. v. David Altman Leasing Corporation*, 731 F.2d 436 (7th Cir. 1984) all hold that diversity jurisdiction does not exist in a case in which one of the parties is a limited partnership composed of limited partners whose citizenship is the same as that of an adverse party.

ARGUMENT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *NAVARRO SAVINGS ASSOCIATION V. LEE*, 446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

The Fifth Circuit sustained diversity jurisdiction in this case because it considered the citizenship of Arkoma Associates' general partners only in determining the presence or absence of diversity jurisdiction. Had it taken into account the citizenship of Arkoma's limited partners, there would have been no jurisdiction in that one of Arkoma's limited partners is stipulated to be citizen of Louisiana as are Petitioners Carden and Limes.

The issue before the Fifth Circuit Court of Appeals in the instant case is the same as that considered by this Court in *Navarro Savings Association v. Lee*, supra. Although this Court affirmed the result reached by the Fifth Circuit therein, it did so by rejecting the logic relied on by the Fifth

Circuit in this case. The organization at issue in *Navarro*, supra, was a Massachusetts business trust, the trustees of which held legal title to the trust assets while the beneficiaries possessed equitable title. The interest of the beneficiaries was represented by trust certificates transferable as stock in a corporation is transferable. Therefore, the beneficiaries were not at all times the same. The Fifth Circuit sustained diversity jurisdiction in *Navarro* by analogizing the trust to a limited partnership and relying on *Colonial Realty Corporation v. Bache & Company*, 358 F. 2d 178 (2d Cir. 1966) which held that in a diversity case involving a limited partnership the citizenship of the general partners alone need be considered. In *Navarro* this Court granted certiorari, affirmed the result reached by the Fifth Circuit, but repudiated its reasoning, holding:

> "Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, unicorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. Ed. 842 (1900) (limited partnership association); see *Steelworkers v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (1965) (labor union); *Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800 (1889) (joint stock company) . . .
>
> But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction . . .

> Federal Rule of Civil Procedure 17 (a) now provides that such trustees are real parties in interest for procedural purposes."

Petitioners submit, as the Third and Seventh Circuits have held, infra, that this Court rejects the principle that only the citizenship of the general partners of a limited partnership determines the presence or absence of diversity jurisdiction. *Navarro's* result was sustained because the organization therein involved was *not* a limited partnership but a business trust.

Federal Rules of Civil Procedure, Rule 17 (a), cited by this Court in *Navarro*, in pertinent part provides:

> "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is brought . . ."

It is noteworthy that neither the general partner of a limited partnership nor any partner is mentioned by *Rule 17 (a)* as a real party in interest. Additionally, there is no division between legal and equitable ownership in a limited partnership as there is in a trust. The four general partners of Respondent own one per cent of the partnership while the forty-eight limited partners own ninety-nine per cent.

This Court's holding in *Navarro*, supra, mandates the presence of "the *real* parties to this controversy" for purposes of determining diversity. How can it be said that such a limited partner's citizenship should not be considered, or that a general partner is a real party in interest and a limited partner is not?

2. THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS ON THE ONE HAND AND THOSE OF THE THIRD, FOURTH, AND SEVENTH CIRCUIT COURTS OF APPEALS ON THE OTHER, CONFLICT ON DETERMINATION OF DIVERSITY JURISDICTION IN CASES INVOLVING LIMITED PARTNERSHIPS.

The Fifth Circuit in *Lee, et al. v. Navarro Savings Association,* 597 F. 2d 421 (5th Cir. 1979); *Mesa Operating Limited Partnership v. Intra State Gas Corporation,* 797 F. 2d 238 (5th Cir. 1986); and in the instant case has held that only the citizenship of the general partners of a limited partnership need be considered in determining diversity jurisdiction in cases involving limited partnerships.

The Fifth Circuit relying on *Navarro* in *Mesa* held:

> "Since we find it unnecessary to consider the citizenship of limited partners, we conclude that it need not be ascertained.
>
> We apply the Supreme Court's analysis in *Navarro Savings Ass'n v. Lee,* 446 U. S. 458 (1980), affirming a decision of this court, to this case . . .
>
> We find this reasoning equally appropriate here. A limited partnership is also neither corporation nor association but a similar hybrid. Here, as in *Navarro*, the power to control and manage assets and litigation rests exclusively with one class of members, the general partners. We think that where it is possible to identify clearly a class of members as the real party to the controversy, the citizenship of that class alone is relevant for diversity purposes."

To the contrary, the Third Circuit in *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); and the Seventh Circuit in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984) have held that the citizenship of both the general and limited partners must be considered in determining diversity jurisdiction.

The Third Circuit in *Trent* held:

> "An analysis of the diversity issue must begin with the undisputed proposition that a limited partnership is an unincorporated association whose citizenship is deemed to be that of the 'persons composing such association'. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S.449, 456, 20 S. Ct. 690, 698, 44 L. Ed. 842 (1900). Applying that holding to the precise issue raised here, this court held that the citizenship of a limited partner will defeat diversity if it is the same as one of the parties on the opposing side. *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F. 2d 1254 (3rd Cir. 1977).
>
> First Federal urges us to abandon the holding of *Carlsberg Resources* on the ground that the subsequent decision of the Supreme Court in *Navarro Savings Ass'n v. Lee*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980), requires that we apply a 'real party in interest' test in determining Trent's citizenship. It argues that under the analysis in *Navarro*, only the general partners are such parties here. We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources*.

> The Court cited limited partnerships as one of the class of unincorporated associations which are to be distinguished from express trusts, and referred approvingly to the holding of *Great Southern Fire Proof Hotel Co. v. Jones*, supra, as governing limited partnerships.
>
> We see nothing in the Court's opinion to support First Federal's position that the *Navarro* holding compels application of 'a real party in interest' test to limited partnerships."

The Fourth Circuit in *New York Teachers* finding that diversity jurisdiction did not exist held:

> "Teachers is a public retirement system created and existing by virtue of Article 11 of the Education Law of the State of New York and having the powers and privileges of a corporation pursuant to Section 502 of that statute. Teachers' principal place of business is in Albany, New York . . .
>
> Except for PTA, all of the defendants/appellants are citizens of states other than New York. PTA is a limited partnership established under the laws of Virginia. Its sole general partner is Kalkus, a resident and citizen of the State of New Jersey. Several dozen limited partners are residents of numerous states, including New York . . .
>
> The district court concluded that it had jurisdiction over the action pursuant to 28 U. S. C. 1332 (a). It ruled that the citizenship of a limited partnership is determined by the citizenship of all of its general partners, without regard to the citizenship of any limited partners, and that, therefore, all of the defendants, for jurisdictional purposes, were citizens of states other than New

York.

Defendants appeal.

On appeal, the primary contention made by defendants/appellants is that the district court lacked subject matter jurisdiction over this action. They maintain that all of the partners of PTA, both general and limited, must be considered in determining whether complete diversity exists. We agree and consequently, do not reach the other contentions raised by appellants."

The Seventh Circuit in *Elston*, finding that diversity jurisdiction did not exist, held:

"The Supreme Court has directed federal courts when determining whether complete diversity of citizenship exists, to disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy. *Navarro Savings Ass'n v. Lee* . . .

When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court . . .

ThermaSol bases its argument for an exception to the rule on an analogy between a limited partnership and an express business trust. TheremaSol points out that general partners, like a trustee, manage the assets of a limited partnership and control litigation involving the partnership . . .

In *Navarro*, the Supreme Court rejected the very analogy upon which ThermaSol now relies . . .

In addition, we reject the argument that limited

partners are not 'real parties' to controversies involving the partnership because they have no capacity to sue on behalf of the partnership."

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this case conflicts with that of this Court in *Navarro Savings Association v. Lee*, supra.

The decisions of the Fifth Circuit Court of Appeals conflict with those of the Third, Fourth, and Seventh Circuit Courts of Appeals with respect to the necessity for considering the citizenship of limited partners when determining the existence of diversity jurisdiction.

Petitioners pray that a *writ of certiorari* be issued by this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By: Richard K. Ingolia
Richard K. Ingolia

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record by depositing the same in the U. S. Mail, postage preapaid this 8th day of ~~February~~ March 1989.

I further certify that all parties required to be served have been served.

Richard K. Ingolia

Richard K. Ingolia

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3624

ARKOMA ASSOCIATES,
Plaintiff-Counter Defendant-Appellee,

versus

C. TOM CARDEN and
LEONARD L. LIMES,
Defendants-Appellants,

MAGEE DRILLING COMPANY, INC.,
Intervenor-Counter Plaintiff-Appellant,

versus

DAVID HEPBURN, ET AL.,
Third Party Defendants-Appellees.

No. 87-3917

ARKOMA ASSOCIATES,
Plaintiff Appellee Cross-Appellant,

versus

C. TOM CARDEN and
LEONARD L. LIMES,
Defendants-Appellants Cross-Appellee

and

MAGEE DRILLING COMPANY,
Intervenor-Appellant Cross-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-85-2295-D (4))

(December 7, 1988)

Before POLITZ, and JOHNSON, Circuit Judges, and Boyle,* District Judge.

POLITZ, Circuit Judge:**

In these consolidated appeals Magee Drilling Company (MDC), C. Tom Carden, and Leonard L. Limes challenge the judgments in favor of Arkoma Associates, a partnership, rendered July 27, 1987 and September 17, 1987. Finding no reversible error, we affirm.

Background

This litigation arises out of Arkoma's lease of two drilling rigs to MDC, a Texas corporation. MDC maintains that it was interested in buying or leasing two rigs capable of drilling to 7,500 feet. Discussions ensued between representatives of Arkoma and MDC. Arkoma avers that it made no representations as to drilling capacity and it gave MDC ample opportunity to inspect the rigs. MDC contends that Arkoma represented that the rigs were capable of drilling to 7,500 feet and that the principal

* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

rig components consisted of new or rebuilt parts.

On June 27, 1984 the parties executed a lease agreement which expressly declared that no warranties were given. Don Magee, president of MDC and an experienced oil and gas operative, signed the lease and initialed each page on an attached rig inventory list. Carden and Limes, also experienced oil men, joined Magee in personally guaranteeing the drilling company's obligations under the lease.

MDC employees inspected the rig equipment and supervised its transportation from Oklahoma to Texas. Upon arrival, damaged and missing parts and the wrong drill pipe were discovered, and the parties amended the lease to give MDC a credit of $45,000 and other concessions.

MDC used the rigs for over five months and drilled 19 wells. MDC contends that the rigs were defective and incapable of drilling to 7,500 feet, and that Arkoma knew of these defects. Arkoma counters that there is no evidence that the rigs could not drill to 7,500 feet because of defective equipment, that no unusual problems were encounted, and that MDC made no complaints until December 1984 when it tried to repudiate the lease.

On December 28, 1984 MDC notified Arkoma that it could no longer honor its obligations to its creditors. An attempt at compromise was unsuccessful and the following month MDC tendered the rigs to Arkoma. Arkoma accepted physical possession to protect its rigs from damage; however, it reserved its rights under the lease. MDC failed to make the February 1985 payment and Arkoma gave notice of default and accelerated the lease payments. Suit

was then filed against Carden and Limes as MDC's guarantors.[1]

Carden and Limes, both Louisiana citizens, moved to dismiss for lack of diversity jurisdiction, contending that one of the partners of Arkoma was also a Louisiana citizen. The district court denied that motion but certified the jurisdictional question. We declined to accept the interlocutory appeal. Carden and Limes counterclaimed and MDC intervened, claiming violations of the Texas Deceptive Trade Practices Act.

Following a bench trial the court awarded Arkoma judgment in the amount of $467,806.25 plus interest and attorney's fees. The counterclaim and intervention were rejected. Carden, Limes, and MDC appeal.

Analysis

1. Jurisdiction

The threshold issue raised on appeal is whether Arkoma properly invoked diversity jurisdiction. As found by the trial court and uncontested on appeal, two of Arkoma's general partners are citizens of Arizona and the other two are citizens of Oklahoma. One partner -- claimed by Arkoma to be a limited partner -- is a citizen of Louisiana, as are Carden and Limes.

The citizenship of a general partnership is determined by the citizenship of all the partners. If Arkoma is a general partnership, complete diversity of citizenship between the parties-plaintiff and parties-defendant does not exist. On the other hand, if Arkoma is a limited

[1] It is not clear from the record why Don Magee was not included as a party-defendant.

partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. *See Navarro Savings Association v. Lee*, 446 U.S. 458 (1980); *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Crop.*, 797 F.2d 238 (5th Cir. 1986).

The district court found that Arkoma, organized under the laws of Arizona, was a limited partnership under the laws of that state. The district court noted that while Arkoma did not comply with all of the requirements of Arizona Revised Statutes Section 29-302,[2] it had, "in good

[2] Section 29-302 of the Arizona Revised Statutes provides, in pertinent part:

> A. Two or more persons desiring to form a limited partnership shall:
>
> 1. Sign and acknowledge a certificate, which shall state:
>
> (a) The name of partnership.
>
> (b) The character of the business.
>
> (c) The location of the principal place of business.
>
> (d) The name and place of residence of each member; general and limited partners being respectively designated.
>
> (e) The term for which the partnership is to exist.
>
> (f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.
>
> . . .
>
> (i) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.
>
> [Subsection (j), (k), (l), (m), and (n) relate to various rights of limited partners.]

faith, substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law."

Appellants maintain that the district court erred in finding that Arkoma was a limited partnership because of its "substantial compliance" with Arizona law. The record reflects that Arkoma's certificate of partnership was filed with the recorder's office in Maricopa County, Arizona on September 1, 1981. An amended limited partnership agreement was filed with the office of the Arizona Secretary of State on September 10, 1982. A second certificate of amendment was filed after the instant suit was initiated. The limited partnership agreement describes the name, place of business and purpose of the partnership, the names of the four general partners, the capital contribution of the general and limited partners, the division of profits and losses between the general and limited partners, and the rights of the limited partners. The names and addresses of the limited partners were not listed.

To the extent that the district court's finding of substantial compliance is a finding of fact, it is not clearly erroneous; to the extent it is a conslusion of law it is not in error. Thus, the juristictional challenge falters. Our recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.* is dispositive. It rejects the arguments advanced by appellants. We find the requisite federal jurisdiction.

---

footnote 2 continued)

2. File for record the certificate in the office of the county recorder of the county in which the principal place of business is situated.

Effective July 24, 1982, section 29-302 was reenacted as section 29-308. A significant change required the filing of certificates of partnership with the Arizona Secretary of State.

2. Viability of lease and guaranty agreements

MDC, Carden, and Limes vigorously contend that the lease and guaranty agreements were vitiated by Arkoma's fraud and nondisclosures. This challenge founders on the shoals of Fed.R.Civ.P. 52(a), which directs that findings of fact by the trial court are to be accepted unless shown to be clearly erroneous.

The trial court found: that Arkoma made "no material representations or omissions as to the quality, capacity or performance of the land drilling rigs"; that Magee and another MDC representative, Joe Claus, had an opportunity to inspect the rigs before the lease was signed; that Claus thoroughly inventoried the rigs prior to the signing; that MDC transported the rigs from Oklahoma to Texas; that after their arrival in Texas, the rigs were inspected and the parties settled a dispute over inappropriate pipe and missing and damaged components by giving MDC a substantial credit; and that 19 wells were drilled in the five months after delivery without any complaint from any MDC representative of Cardin, Limes, or Magee. It is too firmly established to require citation that a finding of fact may not be characterized as clearly erroneous unless the reviewing court has a definite and firm conviction that an error has been committed. Reviewing the trial court's finding in light of the evidence presented, and giving due weight to credibility assessments, we come to no such firm conviction.

3. Surrender of the rigs

MDC, Carden, and Limes argue that Arkoma voluntarily terminated the lease when it accepted physical possession of the rigs in January, contending that Arkoma cannot both take possession of the property and enforce an

Appeals from the United States District Court
for the Eastern District of Louisiana

ON SUGGESSTION FOR REHEARING EN BANC

(Opinion 12/07/88, 5 Cir., 198__, _____F.2d._____)

Before POLITZ, and JOHNSON, Circuit Judges, and BOYLE,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Henry A. Politz
United States Circuit Judge

* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL
	*	ACTION
versus	*	No. 85-2295
	*	
C. TOM CARDEN AND	*	SECTION "D"
LEONARD L. LIMES	*	
	*	Mag. Div. 4
	*	

* *

STIPULATION

IT IS HEREBY agreed and stipulated by an among Arkoma Associates, plaintiff, C. T. Carden and Leonard L. Limes, Defendants, each through undersigned counsel:

1) Arkoma Associates is alleged to be a limited partnership under the law of the State of Arizona.

2) One of the alleged limited partners is a citizen of Louisiana for the purposes of jurisdiction based on diversity of citizenship.

3) The alleged general partners of Arkoma associates and the states of their citizenship are a follows:

David Hepburn	-	Arizona
Dudley Merkel	-	Arizona
Richard Ledbetter	-	Oklahoma
Eldon Qualls	-	Oklahoma

4) This stipulation is in lieu of a formal amendment to the complaint insofar as it identifies the names and domiciles of the general partners.

Respectfully Submitted:

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEP 17, 1987

ARKOMA ASSOCIATES	*	CIVIL ACTION
versus	*	No. 85-2295
C. TOM CARDEN, ET AL	*	SECTION "D" (4)

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law dated July 29, 1987;

JUDGMENT IS HEREBY RENDERED:

1. In favor of Plaintiff, Arkoma Associates, and against Defendants, C. Tom Carden and Leonard L. Limes, in the amount of $467,806.25 plus all additional attorney's fees incurred by Arkoma Associates after April 30, 1987 relating to services performed in connection with pre-trial

DATE OF Entry OCT 23, 1987

preparation, trial work, post-trial and all appeals, plus interest on such sum at the legal rate from February 18, 1985 (date of notice of default) until paid.

2. In favor of Arkoma Associates, Davis A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel dismissing the Counterclaim filed by C. Tom Carden and Leonard L. Limes, with prejudice, at their costs.

3. In favor of Arkoma Associates, Davis A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel dismissing the Interventiona nd ncounterclaim filed by Intervenor, Magee Drilling Company, with prejudice, at its costs.

New Orleans, Louisiana, this 17 day of September, 1987.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED JUNE 29, 1987

ARKOMA ASSOCIATES	*	CIVIL
	*	ACTION
versus	*	No. 85-2295
	*	
C. TOM CARDEN, ET AL	*	SECTION "D" (4)

This matter came on for trial on a former day on the Complaint and Counterclaim and with Magee Drilling Company as an intervenor. After considering the testimony, documentary evidence, argument of counsel and memoranda, the court enters the following Findings of Fact and Conclusions of Law in accordance with Federal Rule of Civil Procedure 52. To the extent any of the Findings of Fact are later held to be more accurately described as Conclusions of Law, they should be treated as such and likewise to the extent that any of the Conclusions of Law are later held to be more accurately described as Findings of Fact, they should be so treated. The court makes these Findings of Fact after observing the demeanor of the witnesses and some of the findings are a result of credibility calls.

DATE OF ENTRY JUL 29 1987

FINDINGS OF FACT

1.

Plaintiff, Arkoma Associates, is a limited partnership dully organized and existing under the laws of Arizona. (Exhibit D-5a).

2.

The Defendants are C. Tom Carden, an individual of the full age of majority and a resident of the Parish of Orleans, State of Louisiana, and Leonard L. Limes, an individual of the full age of majority and a resident of the Parish of Jefferson, State of Louisiana. (Stipulation)

3.

Intervenor, Magee Drilling Company ("MDC") is incorporated under the laws of the State of Texas. (Stipulation)

4.

Counter-claim defendants, David A. Hepburn and Dudley B. Merkel, both citizens of the State of Arizona and Eldon E. Qualls and Richard K. Ledbetter, both citizens of the State of Oklahoma, are the general partners of Arkoma. (Stipulation).

5.

One limited partner of Arkoma is a citizen of Louisiana (stipulation).

6.

Don Magee, former President of MDC is a citizen of the State of Texas.

7.

Magee, Limes and Carden are all experienced in the oil and gas business.

8.

Arkoma Associates purchased two land drilling rigs in late 1981.

9.

On or about June 27, 1984, Arkoma Associates and MDC executed an equipment lease whereby Arkoma Associates leased the two drilling rigs to MDC. (P-3).

10.

Carden, Limes and Magee executed a guarantee agreement on June 27, 1984, guaranteeing performance of all of MDC's obligations under the lease agreement. (P-4).

11.

Prior to executing said lease agreement, MDC through Magee and another representative, Joe Claus, had ample opportunity to inspect the two land drilling rigs.

12.

No material representations or omissions as to the

quality, capacity or performance of the land drilling rigs were made by any representative of Arkoma to MDC, Magee, Limes or Carden prior to confection of the lease agreement between MDC and Arkoma.

13.

MDC, through its representative Mr. Claus, completely inventoried both land drilling rigs prior to signing the lease agreement between Arkoma and MDC.

14.

MDC supervised transportation of the rigs from their locations in Oklahoma to MDC's principal place of business in Alice, Texas. (P-3).

15.

MDC, pursuant to the lease agreement, paid all transportation costs for transporting the drilling rigs to Alice, Texas. (P-3).

16.

Upon arrival of the rigs in Alice, Texas, MDC inspected the drill pipe as provided in the lease and found it was not acceptabale. Various items of equipment, tools and supplies which were missing at the inventory were still missing and certain other component parts and equipment were damaged.

17.

On July 18, 1984, Arkoma and MDC executed an

amendment to the lease which was intended to settle all claims by MDC for drill pipe, as well as missing and damaged supplies and equipment. (P-5)

18.

MDC drilled approximately 19 wells with the Arkoma rigs. (P-22)

19.

Between July 18, 1984, the date of the amendment to the lease and December 28, 1984, neither MDC, Limes, Carden or Magee wrote to Arkoma to complain of any problem with the quality, performance or capacity of the rigs. (Tr. 121)

20.

On December 28, 1984, MDC notified Arkoma in writing that it was no longer able to honor its obligations to creditors, including the February 1, 1985 rental payment to Arkoma.

21.

MDC requested a meeting with the Arkoma representatives to discuss "a compromise on cancellation or extension of the lease;" and put Arkoma on "formal notice" that in the event no compromise at the proposed meeting is reached, the two rigs will be tendered to Arkoma in Alice, Texas sometime in January. (See Trial Exhibit D-1)

22.

Representatives of Arkoma and MDC met in Dallas, Texas on January 16, 1985 to discuss a renegotiation of the lease for the rigs.

23.

At the meeting in Dallas, Texas, no agreement concerning the lease was reached. MDC repudiated its obligations under the lease and tendered the rigs back to Arkoma Associates.

24.

Although the Defendants allege that the meeting in Dallas, Texas in January of 1985 was held purportedly to discuss alleged defects in the equipment, the real purpose of the meeting was to discuss the inability of MDC to live up to its contractual obligations under the lease agreement and to tender the rigs back to Arkoma.

25.

MDC's failure to timely make lease payments was not caused by any defect in the equipment; but, on the contrary, by a general economic down-turn in the oil drilling industry and by an overly optimistic forecast of expected drilling activities by MDC.

26.

Arkoma Associates acted reasonably when it took the rigs into physical possession to protect the rigs from damage or loss after they were tendered and did not thereby terminate its lease agreement with MDC or in

anyway waive its rights to payment under the lease (P-20).

27.

Arkoma associates did not then nor has it ever released MDC, Limes, Carden or Magee from any of its or their obligations under the lease agreement and/or guarantee (P-20).

28.

MDC failed to pay the February 1, 1985 rental payment.

29.

MDC, Carden, Limes and Magee were put on notice of MDC's default of the lease for non-payment of rent for the quarter commencing February 1, 1985 by letter dated February 18, 1985. Said notice of default declared, inter alia, the entire amount of rent due under the lease immediately due and payable.

30.

Neither MDC, Magee, Limes or Carden cured said default.

31.

Paragraph 24 of the lease agreement provides for a method of "cancellation" of the lease, but by its terms is inapplicable because the default and tender of the rig occurred prior to the twelfth month of the lease.

32.

As a result of the breach of the lease, MDC, Carden and Limes are indebted to Arkoma in the amount of FOUR HUNDRED SIXTY SEVEN THOUSAND EIGHT HUNDRED AND SIX AND 25/100 ($467,806.25) DOLLARS, plus any outstanding attorneys fees incurred by Arkoma. The award of $467,806.25 is broken down as follows:

Remaining payments for first year (last two quarters of first year) which were not paid - $36,000 per quarter	+	$ 72,000.00
Second and third year payments - eight quarters at $ 45,000 per quarter	+	360,000.00
Storage fees, incidental costs, attorney's fees submitted	+	80,806.25
Less $45,000 credit for last quarter rental payment provided for in escrow as set out in amendment to lease (P-5)	-	45,000.00
TOTAL		$ 467,806.25

33.

MDC, Limes, Carden and Magee failed to prove that the rigs in question were not reasonably fit for the purpose intended or that the rigs exhibited inordinate repair, maintenance or downtime.

CONCLUSIONS OF LAW

1.

This court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. 1331.

2.

The citizenship of a limited partnership shall be judged by the citizenship of its general partners. *Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation*, 797 F.2d 238 (5th Cir. 1986); *Navarro Savings Association v. Lee*, 466 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).

3.

The equipment lease agreement provided that Texas law would apply and accordingly Texas law is applicable.

4.

Neither MDC, Limes, Carden or Magee have been released from any of its or their obligations under the lease agreement or guarantee agreement. (Paragraph 17, 24 of lease)

5.

Defendants, Limes and Carden, are liable to Arkoma for all obligations of MDC under the lease agreement as well as reasonable attorney's fees and incidental expenses provided in said lease in bringing this action. (Paragraphs 24, 17, 18, 4 of lease; Paragraph 1 of guaranty)

6.

Texas law does not preclude recovery of accelerated rental in breach of lease cases of this nature. *Robinson v. Granite Equipment Leasing Corp.*, 553 S.W.2d 633 (Tex. Civ. App. 1977), *writ ref. n.r.e.; Blakeway v. General Electric Credit Corp.*, 429 S.W.2d 925 (Tex.Civ.App. 1968), *writ ref. n.r.e.*

7.

Neither Arkoma nor its general partners violated any of the provisions of the Texas Deceptive Trade Practices Act and the equipment in question was not misrepresented to MDC, Carden or Limes.

8.

The rigs in question were reasonable suited for the purposes intended.

9.

Plaintiff, Arkoma Associates, is entitled to judgment againsst Defendants, C. Tom Carden and Leonard L. Limes, in the amount of $467,806.25 with interest from February 18, 1985 (date of notice of default) until paid.

10.

The Counterclaim filed by C. Tom Carden and Leonard L. Limes against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel should be dismissed.

11.

The Intervention and Counterclaim filed by In-

tervenor, Magee Drilling Company, against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter and Dudley B. Merkel should be dismissed.

New Orleans, Louisiana, this 29 day of July, 1987.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX D

Application No. A-642

The application for stay of mandate of the United States Court of Appeals for the Fifth Circuit presented to Justice White and by him referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. This order is conditioned upon the posting of a good and sufficient security with the Clerk of The United States District Court for the Eastern District of Louisiana, the adequacy of such security to be determined by a judge of that court.